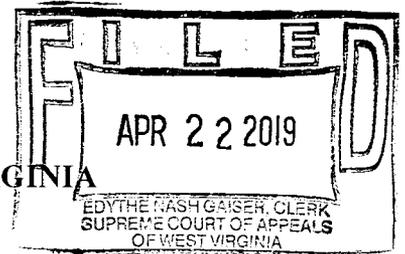


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 18-1097

UNITED FINANCIAL  
CASUALTY COMPANY,  
*defending in the name of*  
JANE DOE,

*Defendant Below/Petitioner,*

v.

Civil Action No. 18-1097

CARL LONG,

*Plaintiff Below/Respondent.*

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**RESPONDENT'S BRIEF**

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Appeal Arising from Orders Entered on  
June 1, 2018, June 13, 2018, June 28, 2018, and  
November 6, 2018 in Civil Action No. 16-C-116 in  
the Circuit Court of Jefferson County, West Virginia

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## STATEMENT OF THE CASE

### I. THE WRECK

On March 29, 2016, near Rippon, West Virginia, a car driven by Jane Doe crossed the center-lane of U.S. Route 340 and crashed into Carl Long's tri-axle dump truck, spinning it around and flipping the truck onto its side, spilling tons of gravel in the roadway. (Crash Report, pp. 2395-2412). In the chaos immediately following the crash, the Jane Doe driver fled, leaving behind her passenger, who claimed not to know the driver's name. *Id.*

When the truck came to a rest on the passenger side, Carl Long was hanging almost upside down from his seatbelt. (Trial Tr. p. 3569). An eyewitness who was behind the hit-and-run driver came over to check on Carl. *Id.* Eventually, Carl pulled himself up to the top of the driver side window and climbed out of the cab. *Id.* Carl Long was sore, and EMTs who eventually arrived, tried to get him to go to the hospital, but his only concern was for his truck because without it, he could not work. (Trial Tr. p. 3572).<sup>2</sup>

Corporal Vincent Tiong of the Jefferson County Sheriff's Office arrived at the scene. (Trial Tr. p. 3827). Despite having investigated hundreds of wrecks over his career, he recalled how agitated Carl was over his truck. (Trial Tr. p. 3829). Cpl. Tiong recalled: "When I talked to Mr. Long he expressed to me that the dump truck was

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<sup>2</sup>Carl testified that once he got home, and the adrenaline wore off, he was in pain. "You start feeling the aches and pains, and you start thinking, 'well yeah, I kind of imagine that from landing on my side there. I had bruises all around my midsection, from here to over here. (indicated) my ribs were hurting pretty good, but that's from where I . . . when I unhooked the seatbelt I fell down onto the gearshift as I was falling onto the floor.'" (Trial Tr. p. 2702-03). However, Carl did not make a personal injury claim, even though he could have, because his primary concern was for his truck and saving his business.

basically his sole income for him and was really upset because he didn't know . . . [h]ow he was going to make money when his dump truck was wrecked." (Trial Tr. p. 3833).

Carl felt physically sick when he realized that Jane Doe had fled the scene. (Trial Tr. p. 3576). The first thought in his mind was "Well how am I going to get it fixed? How am I going to, you know, if there's nobody how do you get it fixed?" *Id.* Suddenly, Carl was faced with an enormous crisis that had the potential to take everything away from him that he had worked for years to build.

## **II. CARL'S STRUGGLE TO SAVE HIS BUSINESS**

Carl had meticulously customized his Freightliner to do exactly what he needed it to do for his hauling and grading business. (Trial Tr. pp. 2641-49). Carl had just installed a brand new motor, and he replaced every hose or plug that could be replaced so that he could use the truck until he retired, in approximately 10 years. (Trial Tr. pp. 2687-89). After the wreck, Carl had no idea if his truck could be repaired or if it would be totaled, but he knew that his business would not survive unless he quickly found a suitable replacement truck. (Trial Tr. pp. 2711-14).

Carl spent every available moment on the internet, scouring advertisements, trying to find a truck that would work for his business that he could get into service right away. (Trial Tr. pp. 2706-20; 2741-48). Carl checked out some trucks in Virginia but quickly realized that they would be unsuitable for the needs of his specialized hauling and grading business. (Trial Tr. p. 2712-13). After two weeks of frantically searching, Carl found a listing for a 2016 Peterbilt truck in Florida that had an aluminum bed which was light enough to haul 18 tons. (Trial Tr. p. 2747-48). Carl knew that if he ordered the truck right away, he could get his business going again, and possibly save his business.

*Id.* Because the Peterbilt was new, Carl would not have the risk of breakdowns, and he knew that his business could not survive another breakdown. (Trial Tr. p. 2718). The Peterbilt's 100% financing had the salutary benefit of requiring no money down, unlike a used truck, which would have required 20% down and higher interest rates. (Trial Tr. pp. 2719-20; 2743-44).<sup>3</sup> Carl's plan was to sell the Peterbilt if his 2005 Freightliner could be repaired. *Id.* Carl worked by himself and did not need, nor could he afford, two trucks.

Carl tried to make the Peterbilt work for his business. (Trial Tr. pp. 2749-52). However, after using the truck for a while, he realized that the Peterbilt was not a long-term solution. *Id.*<sup>5</sup> As a result, in early July of 2017, Carl met with his Freightliner

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<sup>3</sup>Carl testified: "So you're in this mode of, 'okay. What do I do?' And you're sitting there and your mind, you know, you're every day there's running through your head 'what can I do? What do I need to do?' And you don't know what's happening with your other truck, so, when I couldn't get the answer I just had to make the best choice that I felt, which was to get myself back to working in a truck that I felt like once I found out what was wrong with the other and what was involved, then I could make a decision. I could either sell the one I just bought or I could, you know, keep that and use that if the other one—if I did get it back." (Trial Tr. p. 2748).

<sup>5</sup>Carl explained his concerns with the Peterbilt to the jury:

Q: So you bought the Peterbilt?

A: Correct.

Q: Explain briefly to the jury what you had to do once you ordered it.

A: Well, what I did when I was waiting to find out what was going on with the other truck is, I went ahead and sent a couple of apps out to see what all I was qualified for, or see what I could do, and so basically it was all done through the Internet. It was—I had already been pre-approved for the loan, so, you know, I called the guy and talked to him about the specs on the truck and I asked him if it was ready to go, and if they could ship it right away, and he said "yes." You know, I had a couple of concerns about it, but for the most part it was the best option that I felt I had at the time.

Q: What kind of concerns did you have about it?

A: Well, the truck was different than the one I had. It was coming out of Florida. It had air ride suspension. I don't know if anybody knows what an air ride suspension is, but basically the truck sits on airbags. It doesn't have metal springs attached to it. It has four bags of air, and in that tractor trailer when they had an air ride system they move. I mean, it was just so smooth. You

salesman, with whom he designed his 2005 truck, to order a new 19-ton Freightliner, with as close to the same specifications as the truck that Jane Doe destroyed. *Id.* It took Freightliner six months to deliver this permanent replacement truck, and Carl received it in December of 2017. (Trial Tr. pp. 2755-56).

In February of 2017, Carl was able to sell the 2016 Peterbilt but, unfortunately, it was at a loss for him. (Trial Tr. p. 2756). Carl had no choice but to sell it because he could not continue to carry two truck payments, particularly after missing an entire month of income in 2016. Fortunately, after Carl was able to return to work full time in 2017, using a truck that performed identically to his 2005 Freightliner, and without the significant business interruption that he had in 2016, Carl's income was able to rebound to pre-crash levels. (Trial Tr. p. 2857)

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don't have all the bouncing and, you know, I did express the concerns to the salesman and he was, "oh no. You know, everybody loves them. They run fine. They run great."

He didn't—"when you need to spread gravel you just dump the air out of the bag and, you know, it sits it right down and you're good," so I just said "okay. I got to do something," I mean.

Q: Okay. How long did it take you to get the truck and get it—I think we talked about two weeks?

A: It was about two weeks. I don't remember exactly.

Q: Okay. Once you started using it what did you discover?

A: Well, when I got the truck in the very first load I noticed the air ride system is—it's not stable. Like I said, you've got basically four big bags of air that you're riding on. Well, when you're going to a job if you leave air in the bag and start raising the truck up, the whole truckload goes to one side or the other, depending on what side the load's on the truck, because all the air's just out of both sides. It actually helps push the truck over.

So when I called the dealer about it he goes "oh, well, just dump the air off the bag. There's a switch in there. You dump the air off it. Let all the air out and the truck sits right there on the ground." The problem with it, when you go around that corner or curve, there's nothing to push the wheels down on the upper side, so as you start around a corner the truck leans a little bit the more the air starts slipping.

So if you use it and you lean or anything that's curvy or anything like that . . . then all of a sudden the truck gets off the ground.

(Trial Tr. pp. 2748-51).

### III. THE PRETRIAL

On June 1, 2018, the court held its pretrial for the June 12<sup>th</sup> trial. The court first addressed the issue of how to allow Carl Long to seek his annoyance and inconvenience damages against Jane Doe, without implicating his bad faith claim. (Pretrial Tr., p. 2302-03). To avoid the duplication of damages, the court specifically limited Carl's annoyance and inconvenience to just the time between the wreck until Carl could get his replacement truck on the road. (Pretrial Tr., p. 2312-13).<sup>10</sup>

The court also took up Progressive's Supplemental Motion *in Limine* to prevent Carl Long's expert, Chad Lawyer, from testifying. (Pretrial Tr., pp. 1815-26).<sup>11</sup> Progressive tried to exclude Mr. Lawyer from testifying on the basis of W.Va. R. Evid. 702(b), because, Progressive claimed, Mr. Lawyer's opinions were unreliable. *Id.* At the pretrial, Progressive argued entitlement to a *Daubert* hearing and Carl Long's counsel countered that Progressive was citing the wrong section of Rule 702, and it was not a *Daubert* issue. (Pretrial Tr., pp. 2336-38). The trial court allowed Progressive to re-depose Chad Lawyer, just days before trial, to clear up any lingering questions that

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<sup>10</sup>It is inappropriate for Progressive to imply in its brief that the trial court restricted Carl Long's annoyance and inconvenience claim to just 19 days, when the evidence at trial was that he was without a truck for almost a month. (Petitioner's brief, p. 10). The 19-day period was the number of weekdays that Carl would have worked during the nearly-month long period. However, Carl's annoyance and inconvenience did not begin on a Monday and end on a Friday, it was constant for him the entire month of April.

<sup>11</sup>Progressive Commercial is who sold Mr. Long his insurance policy. The underwriter for Progressive Commercial is United Financial Casualty Insurance Company.

Progressive might have about the methodology Mr. Lawyer used to determine Carl Long's lost income. (Pretrial Tr., pp. 2342-46).<sup>12</sup>

Carl Long did not oppose Progressive's Motion *in Limine* 5 regarding punitive damages and Progressive conceded this. (Pretrial Tr. p. 2315). However, because liability was stipulated, Progressive claimed that the court should not allow Carl Long to call the investigating officer to testify because the evidence, Progressive claimed, was irrelevant to Carl's annoyance and inconvenience damages, and only probative of punitive damages. *Id.* The court disagreed and ruled that Carl Long could call Corporal Tiong to testify at trial. (Trial Tr., p. 2349-52). Progressive continued to press the point, and by the end of the exchange, Progressive was convinced that the court had granted it a "limiting instruction," preventing Carl Long's counsel from suggesting at trial that Carl's annoyance and inconvenience was increased because Jane Doe fled the scene of the wreck. (Motion for New Trial, p. 2505).

Carl Long's counsel did not perceive that the trial court issued a "limiting instruction." Progressive's counsel offered to prepare the Pretrial Order but this never occurred. (See Findings of Fact, Order Denying New Trial, p. 3647). As a result, the parties never reconciled their respective understandings with the trial court regarding the meaning and scope of the pretrial rulings.

#### **IV. THE TRIAL**

The trial started on June 12, 2018, and lasted 3 days. During jury selection, it was revealed that two of the prospective jury members were accountants. (Trial Tr. pp. 3207-12). The parties conducted individual *voir dire* and, despite the two accountants'

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<sup>12</sup> Progressive's counsel re-deposed Mr. Lawyer and, on June 8<sup>th</sup>, Progressive filed a Renewed Motion *in Limine* to exclude Mr. Lawyer from testifying at trial. (Renewed Motion, pp. 2261-83). The trial court did not rule on Progressive's motion.

expertise in the same field as the only expert in the case, Progressive's counsel chose not to strike them.

On June 12, 2018, Mr. Long testified, and his testimony continued into the next morning. Mr. Long explained that because spring was his busy time, his inability to work the month of April 2016 was extremely difficult. (Trial Tr. pp. 2769-70). He testified that even after he got the 2016 Peterbilt as a replacement truck into service in late-April, he still suffered losses attributable to the wreck because the Peterbilt could not perform as well as his 2005 Freightliner and it cost more money to run. (Trial Tr. pp. 2771-72).<sup>14</sup> Mr. Long testified that he knew of no adverse weather events, no economic downturns, or no events in the local market, such as a new competitor in his specialized business that could have accounted for his lost business profits in 2016. (Trial Tr. pp. 2273-74).<sup>15</sup> Mr.

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<sup>14</sup>Mr. Long: Well, when I got the truck it was the end of April, so, when I got the Peterbilt, of course, less tons, so every load you lose a ton.... the bottom line is so I was losing \$7 to \$10 very load. On top of that, you put factor you're burning more fuel.

Mr. Skinner: What do you mean burning more fuel?

Mr. Long: The truck didn't get as much fuel mileage on it. . . . Also once you get to the middle of June, late June, July and August you get into that drying factor we talked about where it gets too dry to work. . . . Caltrider said I actually did work more days in 2016 than I did in 2015, but if you look at the numbers [in 2015], the numbers are a lot higher. That's because you didn't have as much productivity. You were running up and down the road empty. You weren't working full days, so hurts the numbers.

(Trial Tr. pp. 2771-72).

<sup>15</sup>Mr. Skinner: So, do you remember anything about the weather in 2016 that sticks out that would have affected your business?

Mr. Long: No.

Mr. Skinner: How about the economy? Do you remember anything about the economy in 2016 that could account for the reduction in your income that year? . . . Do you remember in 2016 whether there was any event or any general downturn in your business that can account for the losses that you have?

Long confirmed at trial that the figure that his accountant determined for his lost income in 2016 was not speculative, but accurate.<sup>16</sup>

When Carl Long's accountant, Chad Lawyer, was called to testify regarding Carl's economic losses, Progressive did not challenge his qualifications. (Trial Tr. p. 2842). Mr. Lawyer explained to the jury that he used the "gross receipts" method, also known as the "compound method," wherein he examined five years of Mr. Long's tax returns and determined what Carl's income would have been in 2016, had the wreck not

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Mr. Long: No, because like I said I ended up working more days in 2016 than I did in 2015.

Mr. Skinner: . . . Was there a new competitor that you became aware that was taking your business in 2016?

Mr. Long: No.

Mr. Skinner: Did you have any personal issues in 2016 that could have accounted for the loss of business sort of like you had in 2012?

Mr. Long: I had some personal issues but they didn't affect the business.

(Trial Tr. pp. 2273-74).

<sup>16</sup> Mr. Skinner: Now, there was a point in this litigation where Mr. Caltrider asked you whether you thought your losses were speculative. Now, here we are in 2018, about over two years have passed. Do you believe based on your role as a small businessman—do you believe that the losses that you're telling this jury today are speculative?

Mr. Long: When Mr. Caltrider asked me that question I kind of didn't truly understand what he was asking . . . the true way to tell was at the end of the year. When the tax returns come out the numbers would show how much or what kind of losses we had.

Mr. Skinner: So but I guess the question is do you think that those losses—now that you know what they are—both from the tax return analysis—do you think that that is speculative?

Mr. Long: No, they were accurate.

(Trial Tr. p. 2274).

occurred. (Trial Tr. p. 2843). Mr. Lawyer testified, to a reasonable degree of accounting certainty, that Carl's lost income in 2016 was \$18,428. (Trial Tr. p. 2856).<sup>18</sup> Mr. Lawyer's conservative opinion was supported by Carl's 2017 tax returns, which showed that without the business interruption and increased expenses in 2016, his income rebounded to pre-crash levels. (Trial Tr. p. 2857).

Aside from Mr. Lawyer's own experience working with hundreds of local companies, Mr. Lawyer conceded that he did not conduct a separate investigation into the existence of other adverse events in 2016 that could have accounted for Carl's business losses, other than the wreck. (Pretrial Tr. p. 2886). However, Progressive's counsel also did not investigate other potential causes to explain to the jury how Carl's steep decline in income was not caused by the wreck.<sup>20</sup>

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<sup>18</sup> Mr. Skinner: So, the amount you determined were Mr. Long's lost profits were \$18,428, is that right?

Mr. Lawyer: Yes.

Mr. Skinner: Do you hold that opinion to a reasonable degree of certainty?

Mr. Lawyer: Yes, I do.

Mr. Skinner: Is there anything that makes you think—that gives you doubt about how accurate that was?

Mr. Lawyer: No, sir. . . . I feel it's a conservative number. There's certainly – knowing Mr. Long has a seasonality to his business where in the springtime is his busiest time of the year. An analysis of his springtimes year to year may result in higher calculation.

(Trial Tr. p. 2856).

<sup>20</sup> While Progressive's counsel argued that the weather conditions in April of 2016 might have prevented Mr. Long from working, he never provided any evidence about the weather. The jury likely knew that historical weather data was equally available to Progressive's counsel, and, had it helped the defense, it would have been provided. Progressive's litigation strategy to argue hypotheticals, without providing evidence of other causes for the lost income was ineffectual.

Mr. Lawyer was permitted to rely upon Mr. Long's statements as to causation. The Court correctly instructed the jury that Chad Lawyer was allowed to rely upon second-hand information in forming his opinions and that the jury could give his testimony the appropriate amount of weight that it felt it warranted. (Jury Instructions, p. 2372). The Court also instructed that the jury could accept or reject any witnesses' testimony, including that of Mr. Long. (Jury Instructions, p. 2370). The Court instructed that the jury could rely upon direct evidence, like Mr. Long's tax records, and make reasonable inferences based upon their own life experiences and common sense. (Jury Instructions, p. 2371).

During jury deliberations, the jury asked if they would be permitted to independently assess Carl Long's lost profits for 2016. (Findings of Fact, Order Denying Motion for New Trial, p. 3660). The Court asked the parties and, despite knowing that two accountants with backgrounds in auditing and tax preparation were on the jury, Progressive's counsel agreed that the jury could independently assess Carl's 2016 lost income. *Id.*<sup>21</sup> It appears that the jury found that Mr. Lawyer's opinions were too conservative, and the jury placed \$40,000 in the verdict for Carl's lost income. *Id.* The jury also included \$64,065 for Carl's loss due to the purchase and sale of the Peterbilt temporary replacement, and \$75,935 for Carl's annoyance and inconvenience. (Verdict Form, p. 2379).

## **V. PROGRESSIVE'S POST-TRIAL MOTIONS**

In Progressive's Renewed Motion for Judgment as a Matter of Law, it contended that the trial court erred in denying its multiple motions to exclude Chad Lawyer from

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<sup>21</sup>Progressive's counsel may have invited error by not qualifying that the court should caution the jury that its independent calculation must be constrained by the testimony and evidence at trial.

testifying on Carl Long's lost income in 2016, and for failing to direct a verdict on Mr. Long's lost income claim at the close of his case-in-chief. (Renewed Motion for Judgment as a Matter of Law, pp. 2466-99).

Progressive's second motion sought a new trial, or, in the alternative, a remittitur of the jury's lost income and annoyance and inconvenience verdicts. (Motion for a New Trial, pp. 2500-2603). Progressive claimed that Carl Long's counsel's alleged violations of the trial court's pretrial "limiting instruction," precluding argument and testimony regarding Jane Doe fleeing, tainted the lost income and annoyance and inconvenience verdicts to the point that had to be reduced or set aside. *Id.*

After carefully considering the Progressive's post-trial motions, Carl Long's responses, and Progressive's replies, the Court entered two comprehensive Orders with numerous factual findings and conclusions of law. The trial court denied Progressive's Renewed Motion for Judgment as a Matter of Law, finding that there was a sufficient factual basis to support the courts' remittitur of the lost income verdict from \$40,000 to \$18,428. (Order Denying Motion for Judgment as a Matter of Law, pp. 3641-42). The Court denied Progressive's Motion for a New Trial, but granted Progressive's motion for a remittitur on the lost income verdict, which Carl Long accepted in lieu of a new trial. (Order Denying Motion for New Trial p. 3669).

### **SUMMARY OF ARGUMENT**

The underlying trial lasted two and a half days and it was not complicated. The court allowed the parties to put on their claims and defenses, and the court was imminently fair in its pretrial and trial rulings.

Progressive claims that the trial court committed error when it refused to exclude Carl Long's accountant, who provided non-scientific testimony to help the jury understand Carl Long's economic losses after the 2016 wreck. The court was right to reject Progressive's request for a *Daubert/Wilt* review of Chad Lawyer's testimony, and it was right to admit the accountant's testimony.

Next, Progressive claims that the trial court erred in refusing a new trial but it does not sufficiently acknowledge that the court granted Progressive's motion for a remittitur on the lost income verdict, which Carl Long accepted. In reviewing all of the evidence, and viewing it in the light most favorable to Carl Long, there was no error, especially given that Carl Long accepted the remittitur, which reduced Progressive's financial obligation, substantially.

Progressive also asserts, for the first time on appeal, that the trial court improperly denied its motion *in limine* on punitive damages, when below, it asserted that the trial court had granted it a "limiting instruction" preventing Carl Long's counsel from making arguments and soliciting testimony about Jane Doe fleeing the wreck. After the trial court denied Progressive's motion for a new trial, in part, because Progressive failed to object when the purported pretrial ruling was violated, Progressive now changes its position, and asserts that its motion *in limine* was denied entirely, in order to avail itself of this Court's ruling in *Miller v. Allman*, 240 W.Va. 438, 813 S.E.2d 91, 94 (2018). Progressive's opportunistic change in position is unavailing. Progressive was obligated to protect the record by objecting at trial, and thus, any potential error was not preserved.

Progressive also claims that the trial court erred in refusing to reduce or vacate the jury's verdict on Carl Long's annoyance and inconvenience damages. However, because

the verdict was supported by substantial evidence, the court was correct to deny Progressive's motion.

Lastly, Progressive injected error into the underlying trial, by disclosing to the jury that it was the true party in interest, and implicitly, it was Progressive who was forcing Carl Long to trial. Progressive may not allow "prejudicial error [to creep] into the record" and then, after an adverse verdict, appeal. Progressive's appeal is not well-founded, and it must be denied.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Oral argument is unnecessary because the instant appeal borders on the frivolous, and the facts and legal arguments can be adequately presented in the briefs and record on appeal. The decisional process will not be significantly aided by oral argument either. As such, a memorandum decision affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

### **ARGUMENT**

#### **I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ALLOWED CARL LONG'S ACCOUNTANT TO TESTIFY REGARDING LOST INCOME; THE COURT ALSO DID NOT ERR WHEN IT GRANTED PROGRESSIVE'S MOTION FOR A REMITTITUR ON THE LOST INCOME VERDICT, IN LIEU OF A NEW TRIAL.**

##### **A. Standard of Review**

This Court explained that "[t]he typical situation in which remittitur is employed is where, on a motion by the defendant for a new trial, the verdict is considered excessive and the plaintiff is given an election to remit a portion of the amount of the verdict or submit to a new trial." *Coleman v. Sopher*, 201 W. Va. 588, 605 n.27, 499 S.E.2d 592,

609 n.27 (1997)(citation omitted). Because a motion for remittitur is usually filed when a defendant seeks a new trial, this Court applies the same standard to both. *Id.*

In reviewing a trial court's grant or denial of a motion for a new trial, this Court applies a two-pronged deferential standard of review. *Tennant v. Marion Health Care Found., Inc.*, 194 W.Va. 97, 104, 459 S.E.2d 374, 381 (1995). This Court has explained that it "review[s] the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and [it reviews] the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review. *Id.*

With respect to Progressive's claimed error that it was entitled to judgment as a matter of law because Carl Long's accountant's testimony was allegedly unreliable, this Court has explained that "[w]hen this Court reviews a trial court's order granting or denying a renewed motion for judgment as a matter of law after trial . . . it is not the task of this Court to review the facts to determine how it would have ruled on the evidence presented. Instead, its task is to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below. Thus, when considering a ruling on a renewed motion for judgment as a matter of law after trial, the evidence must be viewed in the light most favorable to the nonmoving party." Syllabus Point 2, *Fredeking v. Tyler*, 224 W.Va. 1, 680 S.E.2d 16 (2009).

In addition, this Court holds that "in determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which

the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved." Syllabus Point 5, *Orr v. Crowder*, 173 W.Va. 335, 315 S.E.2d 593 (1983).

A verdict may be overturned "only where the evidence points all one way and is susceptible of no reasonable inferences sustaining the position of the nonmoving party."

*Id.*, 173 W.Va. 335, 315 S.E.2d at 605.

**B. The trial court did not err when it allowed Carl Long's accountant to testify since his testimony met the liberal admissibility standard of W.Va. R. Evid. 702, and he was not subject to a *Daubert/Wilt* review.**

Progressive asserts that the trial court erred in failing to grant its multiple motions *in limine* to prevent Carl Long's accountant from testifying at trial. (Petitioner's brief, p. 27). Progressive asserts the trial court should have performed a "gatekeeping function" to exclude Chad Lawyer's expert testimony. (Pretrial Tr. 2336-43).

However, this Court has consistently held that a trial court may only apply the *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Wilt v. Buracker*, 191 W. Va. 39, 443 S.E.2d 196 (1993), *cert. denied*, 511 U.S. 1129, 114 S. Ct. 2137, 128 L. Ed. 2d 867 (1994), gatekeeper analysis to experts whose proposed testimony is based upon scientific knowledge. Syl. Pt. 6, *Watson v. INCO Alloys Int'l, Inc.*, 209 W. Va. 234, 545 S.E.2d 294 (2001)(citing Syl. Pt. 6, *Gentry v. Mangum*, 195 W. Va. 512, 466 S.E.2d 171 (1995)).<sup>40</sup> As such, "[a] court

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<sup>40</sup>This Court explained in *In re Flood Litig. Coal River Watershed*, that "[t]he assessment of whether scientifically-based expert testimony is 'reliable,' as that term is used in *Daubert/Wilt*, does not mean an assessment of whether the testimony is persuasive, convincing, or well-founded." Indeed, "this Court's jurisprudence (and the uniform practice in our trial courts) permits two reasonably well-qualified experts, each using a methodology that is grounded in something more than rank speculation or imagination (like reading tea leaves, detecting auras, and the like), to reach directly opposing conclusions -- and both of the experts' testimonies will

considering the admissibility of [non-scientific] evidence should not apply the gatekeeper analysis set forth by this Court in *Wilt v. Buracker*, 191 W. Va. 39, 443 S.E.2d 196 (1993), and *Gentry v. Mangum*, 195 W. Va. 512, 466 S.E.2d 171 (1995).” *Id.*, at 301, and 241.

A trial court must view non-scientific expert testimony through the lens of W.Va. R. Evid. Rule 702, which contains just three requirements: “(1) the witness must be an expert; (2) the expert must testify to scientific, technical or specialized knowledge; and (3) the expert testimony must assist the trier of fact.” *Gentry*, 195 W. Va. at 524, 466 S.E.2d at 183. “Determinations of whether a witness is sufficiently qualified to testify as an expert on a given subject and whether such expert testimony would be helpful to the trier of fact are committed to the sound discretion of the trial court.” *Id.*, at n.17. *See also* Syl. pt. 1, *State v. McCoy*, 179 W. Va. 223, 366 S.E.2d 731 (1988) (“Expert testimony that helps the jury to understand the evidence or determine a fact in issue is admissible under West Virginia Rule of Evidence 702”). “Basically, the helpfulness requirement simply means that the testimony does not concern something that is within the common knowledge and experience of a lay juror. Beyond that, the question of whether expert testimony will assist the trier of fact goes primarily to the relevance of the evidence.” *Watson*, 209 W. Va. at 303, 545 S.E.2d at 243. A trial court’s decision to admit or reject expert testimony will only be reviewable for an abuse of discretion. *State v. LaRock*, 196 W.Va. 294, 306, 470 S.E.2d 613, 625 (1996).

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nevertheless fully meet the “reliability” threshold for admissibility set forth in *Daubert/Wilt*. 222 W. Va. 574, 582, n.5, 668 S.E.2d 203, 211, n.5 (2001).

Progressive complains that Chad Lawyer's testimony was unreliable but, as this Court has explained before, "there is no 'best expert' rule. Because of the 'liberal thrust' of the rules pertaining to experts, circuit courts should err on the side of admissibility." *Id.*, 195 W.Va. at 525-27, 466 S.E.2d at 184-86; *see also*, II Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers* § 7-2(A) at 24 ("this standard is very generous and follows the general framework of the federal rules which favors the admissibility of all relevant evidence"). "Any lack of knowledge [by a non-scientific expert] goes to the weight of the testimony and not its admissibility. Once an expert testifies the opposing party can cross-examine the expert and reveal any weaknesses in his or her opinion. Once a witness is permitted to testify, it is within the province of the jury to evaluate the testimony, credentials, background, and qualifications of the witness to address the particular issue in question. The jury may then assign the testimony such weight and value as the jury may determine." *Watson*, 209 W.Va. at 243-44, 545 S.E.2d at 303-04.

There is no question that Mr. Lawyer was qualified to testify as an expert because Progressive specifically stated that there was no objection to his qualifications. (Trial Tr., p. 2839). Mr. Lawyer was an accountant who had specialized knowledge that the Court deemed was relevant on a critical issue, and thus, Mr. Lawyer's testimony was properly presumed to be helpful to the jury. Under the liberal admissibility standards of W.Va. R. Evid. 702, the trial court was correct to allow Mr. Lawyer to testify regarding Carl Long's lost income.

Progressive does not dispute the trial court's findings of fact contained in its Order denying Progressive's renewed motion for judgment as a matter of law, nor could

it credibly do so. When viewing the trial court's findings of fact in the light most favorable to Carl Long, they support denial of Progressive's renewed motion for judgment as a matter of law. (Findings of Fact, Order Denying Motion for Judgment as a Matter of Law, pp. 3627-39). As such, Progressive's assignment of error is without merit and the trial court's Order must be affirmed.

**C. The trial court did not abuse its discretion when it granted Progressive's motion for a remittitur, in lieu of a new trial, on the lost income verdict.**

The trial court offered, and Carl Long accepted, a remittitur of the jury's lost income verdict, reducing it from \$40,000 to \$18,428. (Order Denying Motion for New Trial, p. 3669). The trial court did not offer Carl a remittitur *sua sponte*. Rather, Progressive moved for the alternative relief, stating "[s]hould the Court consider a remittitur, it should significantly reduce the Plaintiff's lost business income award to an amount actually supported by the evidence." (Motion for New Trial, p. 2509). The court determined that there was sufficient evidence supporting a verdict of \$18,428 and, in lieu of a new trial, the court offered, and Carl accepted, the reduced verdict. (Order Denying Motion for New Trial, pp. 3669).

Now, after the court granted Progressive's requested relief, Progressive claims that the trial court erred in offering the remittitur instead of granting it a new trial. (Petitioner's brief, p. 28). In support of Progressive's appeal, it cites *Addair v. Motors Ins. Corp.*, 157 W.Va. 1013, 207 S.E.2d 163 (1974), an easily distinguishable case. (Petitioner's brief, p. 24-27). In *Addair*, the plaintiff's expert relied upon only 2 years of pre-crash tax information and failed to include "many normal business costs such as wear and tear, maintenance and repairs of the truck, insurance, taxes and other items" in

his analysis. *Id.* at 1021 and 168. In contrast, Chad Lawyer used 7 years of tax returns and, established conservatively, and with reasonable certainty, Carl's lost income in 2016. Also, unlike the accountant in *Addair*, Chad Lawyer had post incident tax returns, which supported his conservative opinion regarding Carl's 2016 losses.

When the trial court's findings of fact are viewed in the light most favorable to Carl Long, they support the denial of Progressive's renewed motion for judgment as a matter of law. (Findings of Fact, Order Denying Motion for Judgment as a Matter of Law, pp. 3627-39). As such, the trial court's Order granting Progressive's request for a remittitur which Carl Long accepted, must be affirmed.

**II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ALLOWED IN EVIDENCE OF THE WRECK, SINCE IT WAS PROBATIVE OF CARL LONG'S SUBSTANTIAL ANNOYANCE AND INCONVENIENCE CLAIM; BECAUSE PROGRESSIVE THOUGHT THAT ITS MOTION *IN LIMINE* LIMITING SUCH EVIDENCE AND ARGUMENT WAS GRANTED, AND PROGRESSIVE FAILED TO OBJECT AT TRIAL, PROGRESSIVE WAIVED ITS OBJECTIONS.**

**A. Standard of Review**

Under well-settled law, a party who fails to object to evidence or argument that violates a trial court's pretrial ruling is waived. *See Waldron v. Waldron*, 73 W. Va. 311, 317, 80 S.E. 811, 814 (1913) ("If a party who has made an objection permits it to be forgotten, a waiver should be chargeable to the party"); Syl. Pt. 1, *Maples v. West Virginia Dept. of Commerce*, 197 W. Va. 318, 475 S.E.2d 410 (1996) ("A litigant may not silently acquiesce to an alleged error, or actively contribute to such error, and then raise that error as a reason for reversal on appeal"); Syl. Pt. 3, *In Interest of S.C.*, 168 W. Va. 366, 374, 284 S.E.2d 867, 872 (1981) ("An order . . . which was actually approved by counsel, will not be reviewed on appeal."); Syl. Pt. 2, *State v. Adkins*, 209 W. Va. 212,

544 S.E.2d 914 (2001)(“Failure to make timely and proper objection to remarks of counsel made in the presence of the jury, during the trial of a case, constitutes a waiver of the right to raise the question thereafter either in the trial court or in the appellate court.”).

A party who fails to object and preserve error at trial may only seek a new trial under the “plain error” doctrine. W.Va. R. Civ. P. 103(e). However,

[b]y its very nature, the plain error doctrine is reserved for only the most flagrant errors. In order “[t]o trigger application of the ‘plain error’ doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.

Syl. Pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). The plain error doctrine is used sparingly because “[t]here is obviously a considerable tactical advantage to be gained if counsel can remain silent and then press the point on appeal through the plain error doctrine.” *State ex rel. Games-Neely v. Yoder*, 237 W. Va. 301, 310, 787 S.E.2d 572, 581 (2016)(citing *State v. Grubbs*, 178 W. Va. 811, 818, 364 S.E.2d 824, 832 (1987)).

As noted above, in reviewing a trial court’s grant or denial of a motion for a new trial, this Court applies a two-pronged deferential standard of review. *Tennant v. Marion Health Care Found., Inc.*, 194 W.Va. 97, 104, 459 S.E.2d 374, 381 (1995). This Court has explained that it “review[s] the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and [it reviews] the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review. *Id.* In reviewing a motion for a new trial, the trial court must: “(1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in

favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved." Syl. Pt. 5, *Orr v. Crowder*, 173 W. Va. 335, 315 S.E.2d 593 (1983).

"In determining whether a jury verdict is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and all facts which the jury might properly have found in support of its verdict must be assumed as true." Syl. Pt. 5, *Poe v. Pittman*, 150 W.Va. 179, 144 S.E. 2d 671 (1965). In addition, "in an action where damages are indeterminate in character, the verdict of the jury may not be set aside as excessive unless it is not supported by the evidence or is so large that the amount thereof indicates that the jury was influenced by passion, partiality, prejudice or corruption, or entertained a mistaken view of the case." Syl. Pt. 7, *Poe v. Pittman*, 150 W.Va. at 180, 144 S. E. 2d at 674. Significantly, a "mere difference of opinion between the court and the jury concerning the proper amount thereof will not justify the court in setting aside such verdict." Syl. Pt. 5, *Browder v. County Court of Webster County*, 145 W. Va. 696, 116 S.E.2d 867 (1960). Lastly, because jury verdicts are entitled to "considerable deference," this Court will not disturb a trial court's award of damages on appeal as long as that award is supported by some competent, credible evidence going to all essential elements of the award." Syl. pt. 4, in part, *Reed v. Wimmer*, 195 W. Va. 199, 465 S.E.2d 199 (1995).

**B. The results of the discussion at the pre-trial hearing concerning Progressive’s oral motion *in limine* were unclear, as shown by Progressive’s assertion below that its motion was granted and its assertion on appeal that its motion was denied; because there was no clear pretrial ruling on the record, Progressive waived any objection by failing to object at trial.**

Progressive asserted in its Motion for a New Trial that it was granted a “limiting instruction” which barred Carl Long’s counsel from eliciting testimony or arguing that Jane Doe fleeing impacted Carl Long’s annoyance and inconvenience after the wreck. (See Findings of Fact, Order Denying New Trial, p. 3647). Progressive contended below that, “[d]espite the Court’s limiting instruction—‘I hope that plaintiff’s counsel doesn’t dwell on this and take a lot of time on this issue given that it’s stipulated that the truck was totaled’—the Plaintiff presented testimony through two witnesses which revealed that the Defendant Jane Doe was an unidentified, hit-and-run driver who fled the accident scene.” (Motion for New Trial, p. 2506).

However, at no time during the testimony of the two witnesses, did Progressive object to Carl Long’s counsel’s line of questioning. “The rule in West Virginia is that parties must speak clearly in the circuit court, on pain that, if they forget their lines, they will likely be bound forever to hold their peace.” *State ex rel. Cooper v. Caperton*, 196 W.Va. 208, 216, 470 S.E.2d 162, 170 (1996).

Progressive also claimed that Carl Long’s counsel violated the court’s purported “limiting instruction” by mentioning in closing remarks that Jane Doe fled the scene of the wreck. *Id.* Progressive also failed to object to this purported violation. “In order to take advantage of remarks made during an opening statement or closing argument which are considered improper an objection must be made and counsel must request the court to

instruct the jury to disregard them.” *State v. Coulter*, 169 W. Va. 526, 530, 288 S.E.2d 819, 821 (1982).

Progressive now asserts, for the first time on appeal, that the trial court denied its motion *in limine*. Progressive does not acknowledge to this Court that it asserted a contrary position below. Progressive opportunistically changes its position so that it can argue to this Court that it was not required to object at trial, pursuant to *Miller v. Allman*, 240 W.Va. 438, 813 S.E.2d 91 (2018). However, because there was no Pretrial Order, and the pretrial transcript is, unclear as evidenced by Progressive’s vacillating positions, Progressive was obligated to protect the record by objecting at trial. See, *Tennant v. Marion Health Care Foundation, Inc.*, 194 W. Va. 97, 114, 459 S.E.2d 374, 391 (1995) (“It is not the role of the trial judge to present evidence . . . . The party complaining on appeal of the admission of evidence bears sole responsibility for adequately preserving the record on meaningful appellate review.”). Progressive’s failure to prepare the Pretrial Order to protect the record, or object at trial when the alleged prejudice occurred, waives its objections for appeal.

As such, Progressive’s only remaining remedy is plain error pursuant to W.Va. R. Evid. 103(e).<sup>44</sup> However, because there was no error that was plain, or any error seriously affecting the fairness, integrity or reputation of the judicial proceedings below, Progressive is not entitled to a new trial pursuant to the plain error doctrine. Syl. Pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). The trial was fair to all sides, Carl Long was fairly compensated for his significant losses, and he obtained justice.

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<sup>44</sup> “If the issue was not presented to the lower tribunal, the assignment of error must be phrased in such a fashion as to alert the Court to the fact that plain error is asserted.” W.Va. R. App. P. 10(c)(3).

Based upon the forgoing, the trial court's denial of Progressive's motion for a new trial must be affirmed.

**C. The trial court was right to deny Progressive's motion for a new trial on the annoyance and inconvenience verdict since the verdict was justified.**

This Court has observed that when "determining whether a jury verdict is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and all facts which the jury might properly have found in support of its verdict must be assumed as true." Syl. Pt. 5, *Poe v. Pittman*, 144 S.E. 2d 671 (W.Va. 1965). In addition, "in an action where damages are indeterminate in character, the verdict of the jury may not be set aside as excessive unless it is not supported by the evidence or is so large that the amount thereof indicates that the jury was influenced by passion, partiality, prejudice or corruption, or entertained a mistaken view of the case." Syl. Pt. 7, *Poe v. Pittman*, 144 S. E. 2d at 671.

In this case, the jury awarded more than \$104,000 for Mr. Long's economic losses but less than \$76,000 for his annoyance and inconvenience damages. Even after the trial court's remittitur of Carl Long's lost income verdict to just \$18,428, the jury's annoyance and inconvenience damages verdict is still less than Carl's economic damages. A general damages verdict less than one time the liquidated damages does not indicate that the jury was influenced by passion or prejudice.

The Supreme Court has upheld many general damage awards where the verdict has been several times that of a plaintiff's special damages. *See e.g., Adkins v. Foster*, 187 W.Va. 730, 421 S.E.2d 271 (1992)(finding jury award of \$222,133.00 not excessive

where medical bills amounted to \$2,768.00); *Torrence v. Kusminsky*, 185 W.Va. 734, 408 S.E.2d 684 (1991)(concluding jury award of \$207,000.00 was not excessive where medical bills totaled \$8,000.00). This case requires a similar approach. Because there is no legitimate basis to find that the jury's verdict for Mr. Long's annoyance and inconvenience claim was excessive, the verdict must stand.

**III. BECAUSE THE PROGRESSIVE INJECTED ITS OWN INSURANCE BAD FAITH PRACTICES INTO THE TRIAL, AND ALLOWED "PREJUDICIAL ERROR [TO CREEP] INTO THE RECORD," PROGRESSIVE MAY NOT SEEK A NEW TRIAL.**

This Court has held that "[a] new trial should not be granted unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done." *Morrison v. Sharma*, 200 W. Va. 192, 294, 488 S.E.2d 467, 469 (1997) (citations omitted). However, in order for a party to have standing to move for a new trial, the complaining party cannot be the one to have injected the prejudice into the trial.

Progressive's motion *in limine* to preclude the introduction of insurance during the underlying trial was granted. (Pretrial Tr. p. 2328). The trial court bifurcated and stayed Carl Long's annoyance and inconvenience claim into two parts in order to prevent Progressive's bad faith claims handling from being injected into the trial. (Pretrial Tr. p. 2312-13).

However, almost as soon as Progressive's counsel began cross-examining Carl Long, Progressive's counsel violated Progressive's own motion *in limine* by injecting Progressive's bad faith into the case. (Trial Tr. pp. 2777-78). Progressive invited the error by taking advantage of a sardonic comment made by Carl Long's counsel during Carl's deposition by having Carl read out loud only the part of the testimony that

suggested that he believed that his lost income was speculative. *Id.* However, Progressive's counsel published the entirety of the deposition exchange on ELMO, which made it clear to the jury that it was Progressive who was refusing to pay his lost income claim:

MR. CALTRIDER: You assume that everything would have been the same between 2015 and 2016 to get you to the same daily average profit?

A. I am assuming that I could have made this much in 2016, yes.

Q. Okay. But do you know that's actually what you would have made?

A. No, I do not.

Q. Why not?

A. How would you know if you didn't work?

Q. Okay. Well, I mean, what I am asking you is, you have told us you don't have any record of the actual jobs that you would have done in 2016.

A. How do you know what you're going to make when you don't have a truck to work?

Q. Do you have a record of the jobs that you had lined up?

A. I told you no.

Q. So—

A. And how would you know what you're going to make off each job? What if you have a problem on the job and you get delayed and you can't go to the next job, or what if this job cancels, or what if, hey, I got done early and I got two jobs in today and I made even more than last year. There is absolutely no way to know that.

Q. You could have made more or you could have made less in 2016.

A. Exactly. There is no way to verify that.

Q. There is no way to know without speculating.

**MS. DAVIS: Right.**

**BY MR. CALTRIDER: Right?**

**A. Exactly.**

**MS. DAVIS: And, therefore, I guess Progressive is asserting that it owes [you] no damages.**

**THE WITNESS: Because they don't know if I would make any money or not.**

**MS. DAVIS: Right.**

(Order Denying Motion for New Trial, pp. 3665-67).

The whole purpose of bifurcating an underlying case from the bad faith case is to avoid unfair prejudice to the insurer. Progressive's insertion of insurance and Progressive's mistreatment of Carl Long into the case (which was likely perceived by the jury to have continued during trial) was its own fault. Progressive may not violate its own motion *in limine*, introduce highly prejudicial evidence into the case, and then demand a new trial. For this reason as well, the trial court's Order denying Progressive's Motion for a New Trial must be affirmed.

### CONCLUSION

WHEREFORE, Carl Long respectfully requests that this Court issue a Memorandum Decision affirming the trial court's rulings below.

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